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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 134

DAVID NAMET, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 41) is reported at 301 F. 2d 314.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1962 (R. 42). The petition for a writ of certiorari was filed on May 21, 1962, and was granted on October 15, 1962 (R. 42). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a witness who had pleaded guilty to a similar charge was properly called to testify by the

government after the prosecutor had been told that petitioner's counsel had advised the witness to claim the privilege against self-incrimination.

2. Whether the cautionary instruction to the jury regarding the significance of a witness' claim of privilege, which we concede to have been defective, was so seriously prejudicial as to require a new trial, notwithstanding petitioner's failure to object or to raise the issue in the appellate courts.

RULES INVOLVED

Federal Rules of Criminal Procedure:

Rule 30 provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 52 provides:

> (a) Harmless Error.
>
> Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) Plain Error.
>
> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the District of Massachusetts on two counts charging violations of the wagering tax laws.[1] He was sentenced generally to imprisonment for four months and to pay a fine of $1,000 (R. 39). The judgment was affirmed by the court of appeals *per curiam* (R. 41).

1. THE WAGERING OFFENSE

The evidence to support the crime charged is not directly challenged in this Court. It may be briefly summarized as follows:

The petitioner, who was under surveillance, followed the same route each afternoon, stopping for less than one minute at various bookmaking establishments (variety and cigar stores). It was observed that he progressively filled his pockets, until he reached his residence, with the material accumulated during the afternoon (R. 16–17). Each morning,

[1] Count I charged a violation of 26 U.S.C. 4411 in failing to pay the special occupational tax required to receive wagers and Count II charged a violation of 26 U.S.C. 4412 in failing to register to engage in the business of receiving wagers (R. 4).

petitioner again visited these establishments stopping for 3 to 5 minutes at each place. These facts indicated that petitioner was merely collecting the material in the afternoon but was "settling up" in the morning (R. 18).[2] On one occasion, when an agent was standing in a smokeshop, petitioner told the counterman that he would wait until the agent left (R. 18).

On March 19, 1960, petitioner was arrested and his residence searched under authority of arrest and search warrants (R. 35–36). More than $1,000 in bills and coins were found in the house and on his person, together with "number pool" wagering slips, "horse bet" slips, and prepared "pool" cards of the type used in a wagering operation (R. 37). The numbers pads or bookie slips found in petitioner's residence were the originals which would normally be held by the "bookie," rather than the carbon copy given to the players (R. 20–21).

Petitioner admitted to an agent at the time of his arrest that he was aware of the federal requirements of registration before accepting wagers, but claimed that he was not a bookie (R. 36–37). Petitioner's son, a lawyer, took the stand at the trial and claimed that the betting slips had been in the house for a "number of years," and that the bundles and envelopes of money found in the house came from the proceeds of an insurance policy on the life of his mother who had died in 1958 (R. 26–28, 37). He did not explain the

[2] A "pick-up" man or "runner" who has no proprietary interest does not "settle up" (R. 35).

wagering materials found on the petitioner at the time of the arrest. He stated that his father was not a bookie (R. 28).

2. GOVERNMENT WITNESSES WHO CLAIMED THE PRIVILEGE AGAINST SELF-INCRIMINATION

a. Mr. and Mrs. Kahn, who were the proprietors of one of the stores frequented by petitioner, pleaded guilty to wagering tax violations on the morning that petitioner's trial opened (see R. 1–3). They were represented by the same attorney who represented petitioner (R. 1–3).

In outlining the proposed evidence in the opening statement to the jury, the government stated that it had reason to believe that there would be testimony by a husband and wife to the effect that they had accepted wagers for petitioner and that petitioner would settle with them daily for the bets of the previous day (R. 5).

At the conclusion of this opening statement, petitioner's counsel, at a bench conference, noted that the government was going to attempt to use the Kahns as witnesses and stated that, although they had pleaded guilty, "I didn't waive any Constitutional privileges in their behalf" (R. 6). The court indicated that their privileges ceased after they pleaded, but stated that he would rule on any claims if they took the stand and "if they claim the Fifth" (R. 6).

b. Mrs. Annette Kahn was called as a witness by the government. Preliminarily she testified that she and her husband owned a variety store and that she had known petitioner for two years (R. 7). There-

after, when she was asked whether they had some type of business relationship with petitioner, she replied (R. 7):

> Our attorney advised us not to answer on the plea of the Fifth Amendment.

Petitioner's counsel stated, "The defendant refuses to answer on my advice," and the trial judge called a conference at the bench. The trial court stated that, because she had pleaded guilty to this offense, she could be compelled to testify as to it, but not as to other crimes (R. 7). Petitioner's counsel asked permission to stand beside the government witness as her counsel while she testified, but the trial judge did not approve of this procedure (R. 8). Thereafter, petitioner's counsel stated that he would rise from his chair as an indication that the witness was claiming the privilege against self-incrimination under the Fifth Amendment. Counsel also informed the judge that when he had the witness plead guilty, he did not have in mind that she would cooperate with the government (R. 8).[3] Thereafter the court ruled that the witness had a right to claim the privilege under the Fifth Amendment to anything which would lend itself to a charge of conspiracy (R. 9).

During the conference at the bench the government explained that the Kahns had made statements to the

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[3] The Kahns were sentenced on the same day as the petitioner. Irving Kahn was given a suspended sentence of one year; placed on probation and fined $1,500. The imposition of sentence on Annette Kahn was suspended and she was placed on probation (R. 3).

agents, admitting that they had accepted bets; that petitioner would pick up the wagers, leaving 25 percent for the Kahns; and that if the payoff exceeded this amount, petitioner would give them the difference in cash. The government also stated that this testimony would be consistent with the particular slips found in the petitioner's possession relating to this variety store and that this evidence would show petitioner was a principal (R. 10–11). The court ruled that the government could not use the witness to bring out that petitioner had "settled-up" with the Kahns (R. 10–11, see also R. 22–23). The court declined to allow the government to show that the witness did not have the requisite knowledge to be involved in a conspiracy. The government then abandoned its examination of the witness (R. 12–14).[4]

c. Irving Kahn, also called as a witness by the government, testified that he ran a variety store and knew petitioner. When asked whether he had dealings with petitioner in February and March 1960, he declined to answer on the advice of counsel, but the court ruled that the question should be answered. Kahn then admitted that he had dealings with petitioner (R. 23). The court sustained the claim of privilege as to a question asking Kahn to tell what the dealings were, but ordered Kahn to answer whether he accepted wagers at the store in February or March of 1960 (R. 23). Kahn said he did not

[4] In fact, the government's attorney was about to abandon the examination of both Kahns until the trial judge suggested otherwise (R. 14–15).

accept "wagers" and then declined to answer whether he accepted any "bets" in the variety store (R. 24).

At that point, petitioner's counsel stated that Kahn had already pleaded guilty to that and claimed (R. 24), "I guess he is misinterpreting my standing up, your Honor." When the court asked for an explanation, a bench conference followed in which petitioner's counsel explained that rather than objecting all the time, counsel would rise in order to signal to the witness, but that now the witness was confused. The court suggested that counsel remain seated. Counsel complained, "Now I won't know whether to stand up or not," to which the trial judge responded, "Well, don't give him any signals. I will take care of it" (R. 24).

Thereafter the witness stated that he had taken bets in the store and that petitioner had come to the store a couple of times a week. The court allowed the witness to claim the privilege as to questions asking the name of the person on whose behalf he had accepted bets and whether he took bets for petitioner. The government then excused the witness (R. 25).

3. INSTRUCTIONS TO THE JURY REGARDING THE KAHNS' CLAIMS OF PRIVILEGE

In the course of the instructions to the jury, the following charge was given (R. 31):

> Now in the first place, you must not draw any inference from the fact that the defendant himself did not take the stand. He doesn't have to. He can sit mute and stand or fall upon the Government's case. Or he may take the stand as he wishes. But from the fact that

> he didn't take it, you should not draw any inference against him.
>
> Nor should any inference be drawn against him because the Kahns refused to testify, unless it would be a logical inference that would appeal to you as having a direct bearing upon the defendant's guilt.
>
> Now, the layman seems to think that circumstantial evidence is a second-class kind of evidence. It is not. Circumstantial evidence is just as good as direct evidence if it has that impact upon your mind that would exclude every other reasonable hypothesis except the one of guilt.

b. At the close of the instructions (R. 32) the court asked if there were any further requests, or suggestions of errors or omissions. Petitioner's counsel requested only that the court reiterate that if the jurors found the defendant was a bookie, he was guilty but if he was a pick-up man, he must be found not guilty. The court suggested that the point had been covered, to which counsel agreed, but said he thought the charge should end that way. The court allowed the jury to retire without further comment.

SUMMARY OF ARGUMENT

I.

Few witnesses are eager to testify, yet all have a duty to testify in aid of law enforcement. Hence, the general rule is that, absent special circumstances, both the government and the defendant have a right to call witnesses who are able to present relevant evidence.

A. Since the claim of privilege is personal to the witness and must be asserted in relation to specific questions, it is almost invariably necessary to test the propriety and validity of the claim in a judicial proceeding; the pre-trial statement by an attorney or the witness that privilege will be claimed is not ordinarily sufficient. We recognize that unusual cases may arise where the apparent prejudice resulting from the assertion of the claim would outweigh the relevance of the proposed testimony, but this is controlled by the same principles which govern the admissibility of all evidence. In this case, the circumstances fully justified the calling of the Kahns to the stand.

B. The Kahns were able to give direct evidence to support the charge against the petitioner. No one would deny that their testimony would strengthen a case based upon circumstantial evidence, however strong. The government knew of this evidence because the Kahns had given statements to government agents. Furthermore, the Kahns had pleaded guilty to similar charges and thus it was reasonable for the government to believe that they would not claim the privilege or that a claim, if made, would not be upheld. See *Reina* v. *United States*, 364 U.S. 507, 513. In fact all the cases in the courts of appeal which express concern with the problem have drawn the line to exclude cases where the witness has entered a plea. *United States* v. *Maloney*, 262 F. 2d 535, 537 (C.A. 2).

In this case there is an added reason why it was proper for the government to put the witnesses on the stand. Since the petitioner's attorney also

represented the witnesses, there was a likelihood that the claim of privilege would be asserted on impermissible grounds, *i.e.*, to protect the petitioner, rather than the witnesses. In these circumstances, the statement by the attorney for the principal that the witnesses would claim the privilege was properly not allowed to preclude the government from attempting to elicit relevant evidence. Petitioner's counsel, we point out additionally, *made no request* that the witnesses be examined preliminarily outside the presence of the jury.

There is no basis for the complaint that the questioning was unfair. The claim of privilege was asserted in relation to very few questions and was upheld as to still fewer. The Kahns, voluntarily and pursuant to orders of the court, gave important relevant testimony. There clearly was no attempt to badger the witnesses.

II

In its response to the petition for a writ of certiorari, the government called attention to an issue not raised at any stage by petitioner—the correctness of of following cautionary instruction given as part of the charge to the jury:

> Nor should any inference be drawn against [petitioner] because the Kahns refused to testify, unless it would be a logical inference that would appeal to you as having a direct bearing upon the defendant's guilt.

Viewed in the context of the trial—the strong evidence of petitioner's guilt, the closing arguments of counsel

which made no mention of nor comment upon the testimony of the Kahns, and the court's full charge—that ambiguous instruction, though defective, does not call for reversal. The failure of petitioner's counsel to take exception to the instruction or to raise the question in a motion for a new trial, on appeal or in his petition for certiorari confirms the inference that the comment had no impact upon those in the courtroom, or upon the outcome of the case.

The sound judicial policy embodied in Rule 30 of the Federal Rules of Criminal Procedure is pertinent here. Except in extraordinary circumstances, objections must be made at trial in time to allow the court to correct alleged errors and thereby to avoid burdensome and unnecessary retrials. We do not suggest that a failure to make a timely objection should preclude notice of a grave or fundamental error, but only that the extraordinary circumstances which warrant such a rejection of Rule 30 are not present here. The instruction, when viewed in its trial setting, is not of the order of gravity to require reversal of the conviction in the interests of justice.

ARGUMENT

I

THE GOVERNMENT PROPERLY CALLED TO THE STAND COMPETENT WITNESSES WHOM IT REASONABLY BELIEVED TO BE ABLE TO GIVE RELEVANT EVIDENCE

A. THE PROSECUTION IS NOT BARRED FROM CALLING A WITNESS MERELY BECAUSE HE MIGHT CLAIM PRIVILEGE AS TO CERTAIN RELEVANT QUESTIONS

Few witnesses, unless they have a personal interest in the litigation, are eager to testify, particularly in a

criminal case. To overcome traditional testimonial reluctance, both sides must have access to the power of subpoena, a right guaranteed to the defendant by the Sixth Amendment to the Constitution. Every citizen has a duty to testify to the facts which will aid in a judicial determination, subject of course to the protections afforded by law. Hence, the general rule must be that, in the absence of unusual circumstances, either party may, as a matter of right, call to the stand witnesses whom it reasonably believes will be able to offer relevant evidence.

The possibility that the witness may claim the privilege against self-incrimination does not, in itself, constitute a special circumstance which should take a case out of this general rule. Whether the prosecution should refrain from calling a witness in the usual course turns on the particular facts of a given case—the relevance of the testimony; the certainty or lack of certainty on the part of the government that the privilege will be claimed; whether or not there are reasonable grounds for believing that the claim would be sustained in relation to the questions contemplated. In this case, we believe that the government had good and proper reasons to call the Kahns to the stand: it was known that they could give highly relevant testimony and it was reasonable for the prosecutor to assume that the privilege might not be claimed, or, if claimed, that it would not be upheld as to evidence important to the case. The government, therefore, was not bound to change its normal course of action because of statements by the attorney for petitioner

as to what the Kahns would do, particularly since the same attorney represented both petitioner and the Kahns, although their interests were divergent on this score.

The statement by an attorney that a witness is going to claim the privilege against self-incrimination cannot, standing alone, compel the prosecution to refrain from calling him. The privilege is personal to the witness. *United States* v. *Monia,* 317 U.S. 424, 427. It cannot be used to shield others or merely to avoid disgrace. *Brown* v. *Walker,* 161 U.S. 591, 596–605; *Hale* v. *Henkel,* 201 U.S. 43, 69–70; *Rogers* v. *United States,* 340 U.S. 367; *United States* v. *Rosen,* 174 F. 2d 187, 188 (C.A. 2), certiorari denied, 338 U.S. 851.

The witness himself may not escape the duty to testify merely by stating that he is going to claim the privilege. He is bound to appear when subpoenaed and be sworn. *Blair* v. *United States,* 250 U.S. 273, 281–282. He cannot claim the privilege in advance or as to all or any questions. See *United States* v. *Sullivan,* 274 U.S. 259, 264; *Marcello* v. *United States,* 196 F. 2d 437, 441 (C.A. 5). Conversely, a party is not obliged to refrain from asking questions merely because the answers may be incriminating. *United States* v. *Alaimo,* 191 F. Supp. 625, 630 (M.D. Penn.) affirmed, 297 F. 2d 604 (C.A. 3), certiorari denied, 369 U.S. 817. It remains with the witness to claim the privilege in relation to a specific question. Accordingly, even where there is a likelihood that a witness may claim the privilege, it is generally necessary

to test the matter in the crucible of an open judicial proceeding. See *Hoffman* v. *United States*, 341 U.S. 479, 486. Otherwise, the party seeking to adduce the testimony would not know (1) whether the witness, under the solemnity of an oath administered in court, would actually claim the privilege, (2) whether he would be sustained in his claim, or (3) whether the claim relates to all or only part of the relevant inquiry.

The truly exceptional case, we suggest, is typified by *United States* v. *Tucker*, 267 F. 2d 212 (C.A. 3), where the proceedings at a second trial were under review. During the first trial, a witness had asserted his privilege when asked about relevant transactions. At the second trial, the witness was again called and subjected to a "similar inquiry." He again pleaded the privilege. The court held the questioning improper where "[t]here is no suggestion that the government had any reason to believe that at the second trial the witness would answer those questions he refused to answer at the first trial" (*id.* at 215). It said, "* * * a second interrogation, which had no apparent purpose but to invite invocation of the privilege against self incrimination, is improper and is likely to constitute reversible error" (*ibid.*).

In other words, where there are overwhelming probabilities that the witness will claim the privilege and will be sustained in his claim *as to his entire testimony*, he ought not be called at all, or at least not

called before the jury until the matter has been explored by the trial court.[5] Beyond this, one cannot, as Judge Learned Hand stated in *United States* v. *Maloney*, 262 F. 2d 535, 537 (C.A. 2), "lay down any general rule that will cover all instances." Each case must be appraised in the light of the total circumstances—the relevancy of the testimony; the degree of probability that the privilege will be claimed; the potential validity of any claim of privilege; the danger of prejudice; and the likelihood that any valid claim of privilege will go to something appreciably less than the whole of the testimony that the witness is capable of providing.

B. IN THE CIRCUMSTANCES OF THIS CASE THE CALLING OF THE WITNESSES WAS JUSTIFIED

1. *The testimony of the Kahns was directly relevant to the issues on trial.*

There is no question that the government had good reason to believe that the Kahns could give relevant testimony with respect to the charges against petitioner. Surveillance had shown that petitioner followed a route each morning and afternoon which took him into known bookmaking establishments; that he spent a longer period of time in each establishment in the morning than in the afternoon, a routine which would be consistent with the practice of "settling up" in the morning; that in the afternoon petitioner took the material collected to his home and

[5] It is a familiar principle that even relevant testimony may be excluded if its prejudicial effect is so great as to outweigh its relevance. *Gruenwald* v. *United States*, 353 U.S. 391, 424.

that no one came there to pick it up. There were still other circumstances which tended to show that petitioner was engaged in the wagering business as a principal without having paid the special tax—petitioner's refusal to deal in front of strangers; the seizure of bookmaking paraphernalia at the time of his arrest; petitioner's admission that he was aware of federal statutory requirements. However, no lawyer could doubt that the government's case would be strengthened by "direct" evidence that petitioner was in fact acting as a principal with regard to the acceptance of wagers. In their statements to the government the Kahns had indicated they could supply this direct evidence.

2. *In view of the fact that the Kahns had previously given statements and had pleaded guilty, the government could reasonably expect that they would not claim, or would not be permitted to claim, a privilege against testifying as to their dealings with petitioner.*

There was nothing unusual about the position of the witnesses that would in itself suggest that they would claim the privilege if placed upon the stand. Co-defendants and accomplices are competent witnesses and have been used for many years.[6] Since the Kahns had already given statements to agents of the government as to their dealings with petitioner,

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[6] *Benson* v. *United States*, 146 U.S. 325, 333–337; *Rosen* v. *United States*, 245 U.S. 468, 469–472; see *Funk* v. *United States*, 290 U.S. 371, 379–380; *United States* v. *Ford*, 99 U.S. 594.

the prosecutor had a right to expect that they would give the same account before the jury.

Indeed, since the Kahns had already pleaded guilty to engaging in the wagering business without registering and paying the federal tax, the prosecutor originally had no reason to believe that they would claim the privilege or that any such claim would be upheld. See *Reina* v. *United States*, 364 U.S. 507, 513. Once the reason for the rule against compelling incriminating testimony has been eliminated either by plea (*United States* v. *Cioffi*, 242 F. 2d 473 (C.A. 2), certiorari denied, 353 U.S. 975), conviction (*United States* v. *Romero*, 249 F. 2d 371, 375 (C.A. 2)), statute of limitations (*United States* v. *Costello*, 222 F. 2d 656 (C.A. 2), certiorari denied, 350 U.S. 847), or otherwise, the privilege ceases. *Brown* v. *Walker*, 161 U.S. 591, 595–600; *Hale* v. *Henkel*, 201 U.S. 43, 67; *Ullmann* v. *United States*, 350 U.S. 422, 437.

There was, moreover, no apparent likelihood that the Kahns would incriminate themselves further by the testimony sought from the stand. Their extrajudicial admissions apart, they had pleaded to the essential elements of the substantive offense. Thus, it was not likely that any testimony would be elicited at the trial which would afford a basis not already known to the government for any further accusations.

The judge, to be sure, ultimately ruled that the Kahns could properly invoke the privilege because

testimony as to their relationship with petitioner could be used in support of a conspiracy charge. But the prosecutor, long since aware of the relationship of the Kahns to petitioner because of the statements they had given, had not included a conspiracy count in the indictment, and certainly had no reason to think that they would apprehend a further charge. The government has a publicly declared policy against the institution of successive prosecutions growing out of the same facts. See *Petite* v. *United States*, 361 U.S. 529. And there is a certain irony, as noted by the trial judge (R. 9, Tr. 20) that, because a temperate prosecutor did not multiply the offenses by adding a conspiracy count, witnesses who had voluntarily pleaded guilty were able to refuse to give testimony as to the very matters comprehended by their plea. Whether the judge's ultimate ruling on the claim of privilege was correct or not is immaterial to the issue before this Court. What is material is that, in view of the realities of the situation known to the prosecutor, he had reason not to anticipate a claim of privilege and to believe that, if it were asserted, it would not be sustained. We note in this connection that those cases in the courts of appeal which have expressed concern with the problem posed by calling a witness who is likely to claim the privilege against self-incrimination have drawn the line to exclude cases where the witness has entered a plea of guilty. *United States* v. *Mahoney*, 262 F. 2d 535, 537 (C.A. 2); *United States* v. *Cioffi*, 242 F. 2d 473 (C.A. 2),

certiorari denied, 353 U.S. 975; *United States* v. *Romero*, 249 F. 2d 371 (C.A. 2); *United States* v. *Gernie*, 252 F. 2d 664 (C.A. 2), certiorari denied, 356 U.S. 968. See *United States* v. *5 Cases*, 179 F. 2d 519 (C.A. 2) and 86 A.L. R. 2d 1443.

3. *The government was not under a duty to accept as conclusive the statement of petitioner's attorney that the Kahns would claim the privilege.*

As against the forgoing considerations, the government had only the statement of the attorney who represented both petitioner and the Kahns that the witnesses would claim the privilege. Aside from the precept, noted above, that the privilege must be personally claimed by the witness, the circumstances of this case rendered it particularly appropriate to have it determined in open court, under the solemnity of an oath, whether the privilege would be claimed and whether it would be sustained as to all testimony of the Kahns. The interests of the Kahns, who had pleaded guilty, were so different from those of petitioner, who was standing trial, that the government had the right to have the witnesses themselves, under oath, assert the claim of privilege. Furthermore, in view of the plea of guilty there was, as discussed above, a substantial possibility that the claim of privilege would not be sustained, or at least not sustained as to all questions.[7]

[7] The fact that Mrs. Kahn had claimed the privilege as to one question asked during her appearance did not render it im-

The situation, as it appeared, was one in which the lesser offenders had been encouraged to plead guilty on the theory that a light sentence would be imposed, while the principal, who had much more to lose, was standing trial in the hope that he could be acquitted for lack of direct evidence against him. In these circumstances, the attorney for the principal was properly denied the opportunity, on his mere say-so, to control evidence directly relevant to the government's case. Moreover, although petitioner taxes the government for not acting on his suggestion that the witnesses would claim the privilege, at no time did he request—either in his capacity as petitioner's counsel or as counsel for the witnesses—that the trial court conduct a preliminary proceeding out of the presence of the jury.

Nor is there any basis for the complaint that the questioning of the witnesses was unfair to petitioner. Mrs. Kahn was asked only one question as to which she claimed privilege (R. 7). The judge then ruled

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proper for the government to call Mr. Kahn to the stand. The privilege is personal, *United States* v. *Monia*, 317 U.S. 424, 427, and the government was entitled to determine individually as to each witness whether the privilege would be claimed. Petitioner's attorney made no request for preliminary proceedings out of the presence of the jury to determine whether Mr. Kahn would claim the privilege and, if so, whether it would be sustained as to the questions the government intended to ask. Further, it is clear from the proceedings that the interrogation of Mr. Kahn had a proper purpose—he answered a number of questions voluntarily and gave important relevant testimony (see *infra*, pp. 22–23). He was not called "to invite invocation of the privilege against self incrimination * * *". *United States* v. *Tucker*, 267 F. 2d 212, 215 (C.A. 3).

that she could be asked anything that was covered by the plea of guilty, but not questioned as to matters that might implicate her in other crimes (R. 7). Thereafter, she responded to several questions and, after an objection which went not to the privilege but to materiality, she was excused (R. 12–13).

The calling of Mr. Kahn was delayed not, as petitioner suggests, for reasons of strategy, but because the government wished to submit a memorandum on the subject (R. 21–22). When summoned, Kahn was asked 18 questions of which he answered 10 without objection. He claimed the privilege as to eight but was sustained in his claim only as to four. He then answered the other four (R. 23–25).

There is no doubt that each of the Kahns was in a position to give, and did give, relevant evidence as to which they could not properly claim the privilege. The government asked (and petitioner conceded that the question was proper in light of the guilty pleas) (R. 23–24) whether the Kahns had accepted wagers at their variety store in Chelsea in February and March 1960—the time and place (Chelsea) alleged in the information against petitioner (R. 4). The government also asked and both Kahns testified affirmatively (R. 7, 23) whether they knew petitioner. Mr. Kahn was asked and required to answer whether he had had dealings with petitioner during the period in question and how often petitioner had come into his store (R. 24–25). This testimony, when matched with other evidence that petitioner had been observed to make twice-daily calls upon variety stores, such as the

Kahns', in a manner indicative of bookmaking operations, was important circumstantial evidence from which the jury was entitled to infer the petitioner's guilt. The fact that Mr. Kahn gave such testimony both voluntarily and upon orders of the court fully justified the government's action in putting him on the stand.

This case is utterly unlike *Washburn* v. *State*, 164 Tex. Cr. R. 448, 299 S.W. 2d 706 (Br. 10), on which petitioner relies. There the prosecuting attorney called a co-defendant to the stand, who answered one question. Then in 21 pages of testimony the witness refused to answer every additional question, while the State's attorney "by fact-ladened" questions placed the case before the jury. No such spectacle is present in the case at bar. The court drew a line carefully between what it would and would not permit, and the prosecutor respectfully abided by its rulings.

II

THE CAUTIONARY INSTRUCTION TO THE JURY AS TO THE SIGNIFICANCE OF THE KAHNS' REFUSAL TO TESTIFY, THOUGH DEFECTIVE, DOES NOT CALL FOR REVERSAL

In its memorandum response t the petition for a writ of certiorari, the government called attention to an issue not raised at any stage by petitioner, *i.e.*, the correctness of the cautionary instruction given to the jury in relation to the Kahns' refusal to testify fully. The instruction was as follows (R. 31):

> Nor should any inference be drawn against [petitioner] because the Kahns refused to tes-

> tify, unless it would be a logical inference that would appeal to you as having a direct bearing upon the defendant's guilt.

Our memorandum stated (pp. 12–13):

> * * * we would not object to this Court's granting certiorari, if petitioner so requests, for the purpose of remanding the case to the court of appeals in order that that court may indicate whether it has ruled on the question and, if not, may determine whether the apparent error in the charge requires reversal of the conviction despite the failure to raise the point and the strong evidence of guilt. * * *

Petitioner made no response to the government's suggestion but now argues (Br. 13–15) that the instruction was plain error.

However, when viewed in the context of the trial—particularly the strong evidence of guilt, the closing arguments of counsel and the court's entire charge—there are sound reasons for concluding that this instruction, to which no exception was taken, does not require reversal. The judge explained what the charge included and what it did not include (mere gambling or bookmaking). He outlined the general legal propositions applicable to all criminal cases—burden of proof, reasonable doubt, inferences from evidence—and then went on to explain the contested issues in terms of the circumstantial evidence related to the facts of this case. The instruction at issue was part of the general instructions on the inferences from evidence and followed an instruction that the jury must not draw any inferences from the fact that the

petitioner had not taken the stand since he was entitled to remain mute. When the judge came down to the specific facts of the case, summarizing the evidence, no mention was made of any testimony given by the Kahns (R. 31–32). Nor had there been any comment on the testimony of the Kahns in the closing argument of government counsel.

The failure of petitioner's counsel to object and his failure thereafter to allude to the point on appeal confirm the inference that the comment did not have an impact upon those who were present in the courtroom or affect the outcome of the case. The instruction did not deal with a vital issue or phase of the case, as in *Bollenbach* v. *United States*, 326 U.S. 607, 612. It did not relate to an essential ingredient of the offense as in *Screws* v. *United States*, 325 U.S. 91 and *Wiborg* v. *United States*, 163 U.S. 632. It did not involve any constitutional rights of the defendant, as distinct from the witnesses. Cf. *Bruno* v. *United States*, 308 U.S. 287.

There are, of course, important considerations of judicial policy which support the settled principle, reflected in Rule 30, F.R. Crim. P. (*supra*, p. 2), that one must make timely objection or lose the right to assign error.* An objection made at the appropriate

*There is no merit to petitioner's contention that he had no obligation to object at the trial because any further action would have "re-emphasized the role of the Kahns as Government-forced witnesses * * *" (Br. 15). Petitioner was properly afforded an opportunity to make objections out of the hearing of the jury and, even if he believed the damage irreparable, it was still his obligation to call the court's at-

time affords the trial judge an opportunity to correct the error or omission and to avoid the loss and burdens occasioned by a retrial. Cf. *United States* v. *Bryan*, 339 U.S. 323, 333. If counsel are not held to this requirement, the less scrupulous will be encouraged to take out insurance against an unfavorable jury verdict by saving points for the appellate courts. See *Johnson* v. *United States*, 318 U.S. 189.[9]

This is not to urge that grave or fundamental or pervasive errors should go unnoticed in the name of strict observance of rules. It is to say only that the error involved in this case is not, in our view, of such gravity or importance as to require, in the interests of justice, a reversal of the conviction.

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tention to the instruction. Beyond this, his contention does not explain why, if he believed the instruction prejudicial, he did not raise the matter in a motion for a new trial, on appeal or in his petition for certiorari.

[9] In *Johnson* the Court held that, although the error was serious, a knowing failure to object precluded a new trial. Although disapproving of the prosecutor's comment on the defendant's claim of privilege as to certain questions (which the court had sustained), this Court declined to order a new trial because counsel was found intentionally to have failed to save the point, in part, by standing by and voicing no protest during the instructions to the jury. The Court stated (318 U.S. at 201), "The fact that the objection did not appear in the motion for a new trial or in the assignments of error makes clear that the point now is a 'mere afterthought.'"

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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